

No. 04-1144

IN THE SUPREME COURT OF TEXAS

6.30.05

SHIRLEY NEELEY, IN HER OFFICIAL CAPACITY AS
THE COMMISSIONER OF EDUCATION, ET AL.,
Appellants,

v.

WEST ORANGE-COVE CONSOLIDATED I.S.D., ET AL.,
Appellees.

**AMICUS BRIEF OF
THE TEXAS ASSOCIATION OF SCHOOL BOARDS
LEGAL ASSISTANCE FUND
ON BEHALF OF APPELLEES**

On Direct Appeal from the 250th District Court, Travis County, Texas

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Approximately 700 public school districts in Texas are members of the Texas Association of School Boards Legal Assistance Fund (“TASB Legal Assistance Fund”), which advocates for the interests of school districts in litigation with potential statewide impact. The TASB Legal Assistance Fund is governed by three organizations: the Texas Association of School Boards, Inc. (“TASB”), the Texas Association of School Administrators (“TASA”), and the Texas Council of School Attorneys (“CSA”).

TASB is a Texas nonprofit corporation whose members are the 1042 public school boards in Texas. As locally elected boards of trustees, TASB’s members are responsible for governing Texas public schools. TASA represents the state’s school superintendents and other administrators responsible for carrying out the education policies adopted by their local boards of trustees. CSA is composed of attorneys who represent more than ninety percent of the public school districts in Texas.

The fees for preparing this brief are being paid by the TASB Legal Assistance Fund.

See TEX. R. APP. P. 11(c).

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ISSUES PRESENTED

- I. Article VII, section 1 requires the Legislature to “establish and make suitable provision for the support and maintenance of an efficient system of public free schools” in order to accomplish a “general diffusion of knowledge.” Should the Court retreat from its prior school finance decisions and now hold that Article VII, section 1 claims are not justiciable?
- II. The trial court ruled that the state had “substantially defaulted” on its Article VII, section 1 obligation to provide all Texas students with a “meaningful opportunity” to acquire the “essential knowledge and skills” reflected in the state’s mandatory curriculum and graduation requirements. Did the trial court properly identify and apply Article VII, section 1’s adequacy standard?

INTRODUCTION

School finance litigation in the State of Texas is at a critical juncture. It is essential that this Court reaffirm the justiciability of Article VII, section 1 claims, including challenges to the adequacy of the school finance system. It is just as vital that this Court validate the trial court's standard for constitutional adequacy and that court's conclusion that the State has substantially defaulted on its constitutional obligation to make suitable provision for an adequate and efficient public school system. The alternative will have drastic consequences for the over 4,000,000 Texas students entrusted to the care of the public school districts of Texas.

In recent years, the school funding situation has become increasingly dire. The Texas Legislature has established a model set of performance-based education standards for Texas students that describe the characteristics of "a general diffusion of knowledge," and which, if fully implemented and funded, would accomplish that general diffusion of knowledge in the Texas public school system. The Legislature chose to make the public school districts of Texas responsible and accountable for providing the instruction and guidance necessary for Texas students to meet those standards. The Legislature has also, however, steadfastly refused to provide the funding for the facilities, instruction, and other tools needed by the public school districts to provide Texas students a meaningful opportunity to achieve those standards.

The TASB Legal Assistance Fund strongly endorses and supports the position of the Appellee school districts (the “Districts”) that Article VII, section 1 claims are justiciable and that the trial court properly defined and applied Article VII, section 1’s adequacy standard.

SUMMARY OF THE ARGUMENT

First, the question of whether Article VII, section 1 claims are justiciable has already been answered by this Court with a repeated and unambiguous “Yes.” Beginning sixteen years ago with the first school finance case, this Court rejected the State’s current argument that Article VII, section 1 claims are essentially political questions not suitable for judicial review. *See Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W.2d 391, 394 (Tex. 1989). This Court reaffirmed its authority and responsibility to decide whether the Legislature has fulfilled its constitutional obligation under Article VII, section 1 in each of the three school finance cases that followed. And just two years ago, the Court again affirmed that courts have the authority to determine claims, including adequacy, under Article VII, section 1: “[T]he Legislature has the sole right to decide *how* to meet the standards set by the people in Article VII, Section 1, and the Judiciary has the final authority to determine *whether* they have been met.” *West Orange-Cove Indep. Sch. Dist. v. Alanis*, 107 S.W.3d 558, 563-64 (Tex. 2003). The Court’s statements on the justiciability of Article VII, section 1 claims have been remarkably clear and consistent. There is no basis to depart from that precedent now.

Second, the trial court properly defined adequacy by using the Legislature’s own standards and in harmony with this Court’s prior school finance decisions. The trial court properly rejected the State’s assertion that accreditation alone meets the constitutional

standard for adequacy, when accreditation alone does not account for the higher standards, harder programs, and increasing mandates imposed by the Legislature and the federal government. By contrast, the trial court's definition of adequacy fully comports with the Legislature's own policies and standards, and by so deferring to the Legislature's policy choices, adheres to this Court's directive in *West Orange-Cove I*. *Id.* at 582. The trial court's definition also comports with this Court's pronouncement in *West Orange-Cove I* that "the State's provision for a general diffusion of knowledge must reflect changing times, needs, and public expectations," *id.* at 572, and this Court's recognition that efficiency and adequacy are intertwined. *Id.* at 566, 571. Thus mindful of its own institutional role, the trial court properly embraced the Legislature's own academic standards as the measure of an adequate education.

Finally, the trial court properly determined based on the evidence before it that heightened state and federal standards, changing demographics, and increased public expectations have all contributed to make the current system inadequate to meet the constitutional mandate of a general diffusion of knowledge. By failing to provide for these changes, the Legislature has substantially defaulted on its obligation under Article VII, section 1 to "make suitable provision for the support and maintenance of an efficient system of public free schools" so that all Texas school children will have a meaningful opportunity to meet the state's education standards.

ARGUMENT

I. ARTICLE VII, SECTION 1 CLAIMS ARE JUSTICIABLE.

The TASB Legal Assistance Fund agrees with the Districts that the Article VII, section 1 claims are justiciable. The TASB Legal Assistance Fund further agrees that the standards-based educational system the Legislature has already put in place, with adequate state funding for the school districts that have to implement that system, should accomplish a general diffusion of knowledge. The Legislature itself has demonstrated that there are discoverable and manageable standards for measuring school system and student performance, including the level of knowledge students attain. While the Legislature has the ability and responsibility to enact those administrative and academic standards, the judiciary clearly has the ability and responsibility to determine whether the Legislature has met its Article VII, section 1 obligations under discoverable and manageable legal standards.

A. This Court Has Consistently Held That Article VII, Section 1 Claims Are Justiciable.

Invoking the venerable United States Supreme Court precedent of *Baker v. Carr*, 369 U.S. 186 (1962), the State argues that the adequacy claims presented are nonjusticiable political questions because they involve either “a textually demonstrable constitutional commitment of the issue to a coordinate political department; or a lack of judicially discoverable and manageable standards for resolving it.” State Br. at 32. Review of this Court’s prior school finance decisions clearly demonstrates that this Court has consistently rejected that position, and it should continue to do so.

In *Edgewood I*, the court of appeals had declined to address the Article VII, section 1 challenge as “essentially a political question not suitable for judicial review.” *Kirby v. Edgewood Indep. Sch. Dist.*, 761 S.W.2d 859, 867 (Tex. App.—Austin 1988), *rev'd*, 777 S.W.2d 391 (Tex. 1989). This Court unanimously disagreed:

This is not an area in which the Constitution vests exclusive discretion in the legislature; rather the language of article VII, section 1 imposes on the legislature an affirmative duty to establish and provide for the public free schools. This duty is not committed unconditionally to the legislature’s discretion, but instead is accompanied by standards. By express constitutional mandate, the legislature must make “suitable” provision for an “efficient” system for the “essential” purpose of a “general diffusion of knowledge.” While these are admittedly not precise terms, they do provide a standard by which this court must, when called upon to do so, measure the constitutionality of the legislature’s actions.

Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 394 (Tex. 1989) (“*Edgewood I*”).

Thus, sixteen years ago, this Court expressly rejected both of the arguments the State offers today to avoid the measure of its performance under the Texas Constitution. The Court made plain that the text of Article VII, section 1 does not unconditionally commit education to the Legislature’s discretion, and that Article VII, section 1 does contain judicially discoverable and manageable standards. Therefore, the Court ruled that Article VII, section 1 claims are justiciable.

This Court reaffirmed the justiciability of Article VII, section 1 claims three years later in *Edgewood II*:

We do not undertake lightly to strike down an act of the Legislature. We are mindful of the very serious practical and historical difficulties which attend the Legislature in devising an efficient system, and we recognize the efforts of the legislative and executive departments to achieve this goal. We do not

prescribe the means which the Legislature must employ in fulfilling its duty. Nor do we suggest that an efficient funding system will, by itself, solve all of the many challenges facing public education in Texas today. Nevertheless, our duty is plain: we must measure the public school finance system by the standard of efficiency ordained by the people in our Constitution. The test for whether a system meets that standard is set forth in our opinion in *Edgewood I*. 777 S.W.2d at 397-98. Under that standard, we therefore hold as a matter of law that the public school finance system continues to violate article VII, section 1 of the Constitution.

Edgewood Indep. Sch. Dist. v. Kirby, 804 S.W.2d 491, 498 (Tex. 1991) (“*Edgewood II*”).

While the principal focus in *Edgewood IV* was on Article VIII’s state ad valorem tax prohibition, the Court again reaffirmed the justiciability of Article VII, section 1 claims:

This Court’s role under our Constitution’s separation of powers provision should be one of restraint. We do not dictate to the Legislature how to discharge its duty. As prominent as this Court’s role has been in recent years on this important issue, it is subsidiary to the constitutionally conferred role of the Legislature. The people of Texas have themselves set the standard for their schools. Our responsibility is to decide whether that standard has been satisfied, not to judge the wisdom of the policy choices of the Legislature, or to impose a different policy of our own choosing.

Edgewood Indep. Sch. Dist. v. Meno, 917 S.W.2d 717, 726 (Tex. 1995) (“*Edgewood IV*”).

And finally, just two years ago in *West Orange-Cove I*, this Court affirmed the justiciability of Article VII, section 1 claims yet again:

The final authority to determine adherence to the Constitution resides with the Judiciary. Thus, the Legislature has the sole right to decide *how* to meet the standards set by the people in Article VII, Section 1, and the Judiciary has the final authority to determine *whether* they have been met.

West Orange-Cove Consol. Indep. Sch. Dist. v. Alanis, 107 S.W.3d 558, 563-64 (Tex. 2003)

(“*West Orange-Cove I*”). The State’s insistence that the District’s Article VII, section 1

claims are not justiciable is inexplicable in the face of this Court's clear and repeated holdings to the contrary.

B. This Court's Prior School Finance Decisions Recognize That Article VII, Section 1 Adequacy Claims Are Justiciable.

In apparent recognition of the weight of this accumulated precedent, the State suggests that "the Court should cabin its review of the school system to the limited scope of its initial *Edgewood I* inquiry—efficiency—and reject the districts' request that the Court expand its review to encompass the adequacy of Texas's entire system of education." State Br. at 36. The State claims that the Court's prior decisions have not determined "that adequacy *per se*, is justiciable." *Id.* A review of those prior decisions shows that the State's assertion is inaccurate.

Edgewood I and *Edgewood II* are fairly characterized as "efficiency" not "adequacy" cases. Their focus was on the vast disparity in funding between high property wealth districts and low property wealth districts. The relief sought was the elimination of that funding disparity. However, even in the context of these "efficiency" cases, the Court expressly acknowledged that "[t]he amount of money spent on a student's education has a real and meaningful impact on the education opportunity offered that student," and observed that the differences in the educational programs offered by high and low wealth districts were "dramatic." *Edgewood I*, 777 S.W.2d at 393. *Edgewood III* was an Article VIII case that narrowly turned on the constitutional prohibition against state ad valorem taxes. The justiciability of Article VII, section 1 adequacy was admittedly not at issue in that case.

Article VII, section 1 adequacy was, however, more directly implicated in *Edgewood IV*. In that case, this Court explained that a legislative determination of constitutional adequacy is entitled to deference, but is not constitutionally conclusive:

This is not to say that the Legislature may define what constitutes a general diffusion of knowledge so low as to avoid its obligation to make suitable provision imposed by article VII, section 1. While the Legislature certainly has broad discretion to make the myriad policy decisions concerning education, that discretion is not without bounds.

Edgewood IV, 917 S.W.2d at 730 n.8. For purposes of analysis, the Court simply assumed that the legislatively defined “accredited education” provided a general diffusion of knowledge, and identified the cost of providing that constitutional minimum. *Id.* at 730.

In *West Orange-Cove I*, the school districts alleged that the costs of providing an adequate education had risen to such an extent that the \$1.50 cap had become both a floor and a ceiling, denying them any meaningful discretion in setting their tax rates. Because the case was decided on the pleadings, the allegations concerning the costs of providing the constitutional minimum were taken as true. Even though, under those circumstances, the Court had no need to address the contours of Article VII, section 1 adequacy, it nevertheless took the opportunity to again emphasize that it has the power to do so, by elaborating on its prior holding in *Edgewood IV*:

We cautioned, however, that the Constitution does not give the Legislature a completely free hand in determining what level of education will achieve the general diffusion of knowledge required by article VII, section 1 The interrelated constitutional standards of efficiency and adequacy both limit legislative discretion.

West Orange-Cove I, 107 S.W.3d at 571 (quotation from *Edgewood IV* omitted).

As the above analysis demonstrates, Article VII, section 1 justiciability, including the justiciability of adequacy, was examined and confirmed in *Edgewood I*, *Edgewood II*, *Edgewood IV*, and *West Orange-Cove I*. The State's contention that the justiciability of "adequacy, *per se*" is an open question is without merit.

C. On Its Face, Article VII, Section 1 Imposes a Mandatory Duty Defined by Manageable Legal Standards.

In Article VII, section 1, the people of Texas imposed a constitutional duty on the Legislature:

A general diffusion of knowledge being essential to the preservation of the liberties and rights of the people, it shall be the duty of the Legislature of this State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.

TEX. CONST. art. VII, § 1. The provision establishes one general constitutional requirement for a statewide public school system with three separate but intertwined characteristics—adequacy, efficiency, and suitability. This Court summarized these characteristics in *West Orange-Cove I*:

First, the education provided must be adequate; that is, the public school system must accomplish that "general diffusion of knowledge . . . essential to the preservation of the liberties and rights of the people". Second, the means adopted must be "suitable". Third, the system itself must be "efficient".

107 S.W.3d at 563. In addition, the provision imposes a legal duty on the Legislature to establish and maintain such a system. As explained above, this Court has consistently recognized its own legal duty to determine whether the Legislature has in fact fulfilled its

constitutional duty to establish and maintain a system of public free schools that has the three constitutionally mandated characteristics.

D. The Justiciability Issue Is Distinct From the Merits of the Adequacy Issue.

Strictly speaking, the issue presented on justiciability is not whether the trial court has properly defined Article VII, section 1 adequacy, but whether the term can be meaningfully defined. The fact that the State, the school districts, and the trial court have proffered definitions for it, however, belies the State's argument that "adequacy, *per se*" is nonjusticiable. The trial court's formulation is a manageable one that fully comports with the Legislature's standards and this Court's prior school finance decisions.

II. THE TRIAL COURT PROPERLY DEFINED ADEQUACY BY USING THE LEGISLATURE'S OWN DETAILED STANDARDS AND IN KEEPING WITH THIS COURT'S PRIOR SCHOOL FINANCE DECISIONS.

The trial court concluded that the Texas school finance system is unconstitutional because the state has substantially defaulted on its constitutional obligation to make suitable provision for a "general diffusion of knowledge"—in other words, the Legislature has failed to meet its constitutional duty to provide the children of Texas with an adequate education by a system of public free schools. TEX. CONST. art. VII, § 1; COL 18-20. The State argues that it has met its duty to provide for the general diffusion of knowledge by creating an accountability system, and that the trial court's definition of adequacy is overly broad. These arguments fail because they ignore the evidence presented at trial and the reality faced daily by school districts as they struggle to meet increasing state and federal education mandates without the necessary resources. As demonstrated below, the trial court properly defined

adequacy in terms of the Legislature's own standards and in keeping with this Court's prior school finance decisions, while the State's alternative definition wholly fails to take into account "changing times, needs, and public expectations." *West Orange-Cove I*, 107 S.W.3d at 571 (quoting *Edgewood IV*, 917 S.W.2d at 732 n.14).

A. The State's Assertion That Accountability Is the Equivalent of Adequacy Is Incorrect.

The State argues that "[b]y putting into place a comprehensive system of accountability standards, the Legislature is meeting its duty to provide for a general diffusion of knowledge statewide." State Br. at 71. The assertion that having an accountability or accreditation system in place is sufficient to discharge the Legislature's constitutional duty is wrong on two counts.

First, the State's argument ignores what this Court clearly recognized in *Edgewood IV*: that sufficient resources are necessary to provide for a general diffusion of knowledge. See 917 S.W.2d at 731 n.10, 732. Strong academic standards, accountability, and sufficient funding are all necessary to achieve a general diffusion of knowledge. See FOF 43-64 (discussing how higher state and federal standards create higher costs for school districts). Accountability alone is not enough, and even the State's witnesses agreed that the education system needs the financial capacity now to meet the higher performance targets of the coming years. FOF 38, 83.

Second, in *West Orange-Cove I*, this Court already rejected the State's argument here by recognizing that accreditation standards and a general diffusion of knowledge may or may

not be identical: “It may well be that the requirements are identical But it is possible for them not to be—an accredited education may provide more than a general diffusion of knowledge, or vice versa” 107 S.W.3d at 581. And while accreditation relates to or is a direct measure of school district performance, the “general diffusion of knowledge” standard relates to or is directly measured by student performance. The evidence at trial in fact demonstrated why a conclusive presumption equating school district accreditation with the accomplishment of a general diffusion of knowledge among the district’s students is inappropriate. *See, e.g.*, FOF 51-54.

For example, under the 2003-04 accountability system, a district is considered “academically acceptable” even if: (1) a quarter of its students dropped out between ninth and twelfth grades (25 RR 188); (2) only 25% of its students pass the science Texas Assessment of Knowledge and Skills (“TAKS”) test; and (3) only 35% pass the math TAKS test. FOF 30. In 2003-04, an eleventh grader could pass the science and math tests by answering fewer than half the questions correctly. FOF 31; PX 675. Moreover, there was testimony that accreditation levels were intentionally set low so to minimize the number of districts that would be declared low performing. FOF 32; 7 RR 193-6; PX 529:12; PX 742:21-22.

The trial court also heard evidence from state witnesses acknowledging that an “academically acceptable” school district rating alone does not guarantee accomplishment of a general diffusion of knowledge because it fails to take into account significant aspects of the education requirements imposed by the Legislature. For example, the mandatory

Texas Essential Knowledge and Skills (“TEKS”) curriculum includes courses in foreign languages, fine arts, economics, and technology applications, among other subjects. FOF 45. Additionally, all high school students, with limited exception, must meet the more rigorous graduation requirements of the Recommended High School Program (“RHSP”), which includes more higher level math and science. FOF 44, 49. But the accreditation rankings rely heavily on TAKS scores, which measure fewer than half of the subjects included in the required high school curriculum and less than a fourth of the subjects required for elementary and middle school. FOF 34. And, to the extent accreditation ratings rely on drop-out and completion rates, the evidence “casts considerable doubt” as to the accuracy of the data on which the rankings are based. FOF 36; AX 9019; 15 RR 20-45. Finally, the Texas Education Agency’s own Associate Commissioner of Accountability testified that the accountability system measures only “a portion of what the requirements are for the Texas Public Schools.” 25 RR 159. The trial court thus correctly rejected the State’s definition of adequacy, which would have excluded the majority of the Legislature’s own requirements from that definition.

In *West Orange-Cove I*, this Court reiterated its warning from *Edgewood IV* that the interrelated constitutional standards of efficiency and adequacy both limit legislative discretion, and that the Legislature “may [not] define what constitutes a general diffusion of knowledge so low as to avoid its obligation to make suitable provision imposed by article VII, section 1.” 107 S.W.3d at 571 (quoting *Edgewood IV*, 917 S.W.2d at 730 n.8). Here, the trial court properly rejected the State’s efforts to do just that by equating district

accountability rankings with the much more comprehensive requirements imposed by the Legislature and the federal government. *See* FOF 37.

B. The TASB Legal Assistance Fund Agrees With the Districts That the Trial Court’s Definition of Adequacy Comports with the Legislature’s Standards and This Court’s Precedent.

Far from expanding the constitutional mandate of adequacy to include “a wish list of anything an educator might believe would benefit children,” (State Br. at 64), the trial court defined adequacy using the Legislature’s own detailed standards and in keeping with this Court’s prior school finance decisions. This definition properly frames adequacy in terms of an opportunity for all students to achieve state education standards.

1. The trial court’s definition of adequacy contains two essential components: legislative standards and a meaningful opportunity to meet those standards.

The trial court concluded that to fulfill the constitutional obligation to provide a general diffusion of knowledge districts must:

provide “*all Texas children . . . access* to a quality education that enables them to achieve their potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation.” TEX. EDUC. CODE § 4.001(a) (emphasis added). Districts satisfy this constitutional obligation when they provide all of their students with a *meaningful opportunity* to acquire the essential knowledge and skills reflected in Texas’s curriculum requirements (TEKS), and the Recommended High School Program, such that upon graduation, students are prepared to “continue to learn in postsecondary educational, training, or employment settings.” TEX. EDUC. CODE § 28.001 (emphasis added)

COL 7.

This definition has two essential components. First, the trial court deferred to the Legislature in defining the content of an adequate education—primarily, the TEKS curriculum and the Recommended High School Program (“RHSP”—which is now required for most students). *See* COL 7-8. Second, the trial court defined adequacy in terms of providing a meaningful opportunity to all students to acquire the knowledge and skills identified as necessary by the Legislature. COL 7; *see* TEX. EDUC. CODE § 4.001(a).

The trial court did not create this definition out of whole cloth. The court properly used the Legislature’s own education standards to define the content of an adequate education, in keeping with this Court’s admonition in *West Orange-Cove I* that courts must defer to the Legislature’s policy choices in determining what constitutes an adequate education. 107 S.W.3d at 582. Likewise, the definition comports with this Court’s recognition in *West Orange-Cove I* that beginning with *Edgewood I*, the Court has viewed the standards of efficiency and adequacy as intertwined. *Id.* at 566, 571. Thus, as demonstrated below, the trial court’s definition of adequacy as encompassing a meaningful opportunity to meet the Legislature’s standards adheres to the Legislature’s policy choices and follows this Court’s directives from *West Orange-Cove I*.

2. The trial court’s definition of adequacy properly incorporates the Legislature’s education policies and standards.

In defining the content of an adequate education, the trial court was careful not to overstep the bounds of its judicial authority by “[reviewing] the Legislature’s policy choices in determining what constitutes an adequate education . . . [or] [reviewing] those choices one

by one or [attempting] to define in detail an adequate education.” *West Orange-Cove I*, 107 S.W.3d at 582. Rather, without criticizing or rejecting the Legislature’s choices, the trial court deferred to the Legislature’s prerogative and duty to define the scope of what students are expected to learn, referring specifically to TEKS and RHSP. *See* COL 7. State experts testified that TEKS and the RHSP are part of the state’s “general diffusion of knowledge” requirement. *See* 6 RR 217-18; PX 748:30-31, 68-69.

The trial court also relied extensively on legislative statutes and directives in crafting its definition of adequacy to require the provision of a meaningful opportunity to achieve an adequate education to all students. FOF 18-29. For example, following *Edgewood IV*, the Legislature articulated its intent to establish a more rigorous curriculum that would require “all students” to demonstrate the essential knowledge and skills, and that the essential knowledge and skills “shall also prepare and enable all students to continue to learn in postsecondary education, training or employment settings.” TEX. EDUC. CODE § 28.001. By following through on its intent and establishing new curriculum standards and assessments, the Legislature accepted its responsibility and made the necessary policy choices. By holding the Legislature to those policy choices, the trial court appropriately deferred to those choices as required by *West Orange-Cove I*.

In passing Education Code § 4.001, the Legislature again acknowledged its duty to ensure that all Texas school children have access to a quality education reflecting the reality of a changing world: “The mission of the public education system of this state is to ensure that all Texas children have access to a quality education that enables them to achieve their

potential and fully participate now and in the future in the social, economic, and educational opportunities of our state and nation.” TEX. EDUC. CODE § 4.001(a); *see West Orange-Cove I*, 107 S.W.3d at 581, 584 & n.124 (recognizing that the Legislature has defined the mission of the public school system to accomplish a general diffusion of knowledge). And the Legislature has further adopted policy language explicitly recognizing the state’s responsibility to provide adequate resources so that all students have the opportunity to meet the Legislature’s elevated expectations:

It is the policy of this state that the provision of public education is a state responsibility and that a thorough and efficient system be provided and substantially financed through state revenue sources so that each student . . . shall have access to programs and services that are appropriate to the student’s education needs

TEX. EDUC. CODE § 42.001.

The trial court’s definition of adequacy is taken directly from these statutes. *See, e.g.*, FOF 18-19, 21, 24; COL 7. Consistent with its institutional role, the court properly embraced the Legislature’s own academic standards as the measure of an adequate education. Given these statutes, and in keeping with this Court’s prior school finance decisions, the trial court properly concluded that the constitutional mandate of a “general diffusion of knowledge” means more than an “academically acceptable” rating under the accountability system.

3. The trial court’s definition is consistent with this Court’s prior school finance decisions.

The trial court carefully crafted a definition of a “general diffusion of knowledge” that is consistent with this Court’s prior school finance decisions. In *Edgewood I*, this Court

quoted the chair of the education committee from the Constitutional Convention of 1875 as declaring on behalf of the majority of the committee that “the means of a common school education should, if possible, be placed within the reach of every child in the State.” *Edgewood I*, 777 S.W.2d at 395 (quoting S. MCKAY, DEBATES IN THE TEXAS CONSTITUTIONAL CONVENTION OF 1875 198 (1930)). *Edgewood I* also implicitly recognized some of the aspects of an adequate education by comparing the education offered by property-poor districts to that offered by wealthier districts, and noting the importance of: (1) extensive curricula; (2) up-to-date technological equipment; (3) adequate libraries and library personnel; (4) teacher aides; (5) counseling services; (6) lower student-teacher ratios; (7) adequate facilities; (8) parental involvement programs; (9) drop-out prevention programs; and (10) the ability to attract and retain experienced teachers and administrators. *Id.* at 393. By highlighting these differences the Court acknowledged that having the necessary resources available absolutely impacts the quality of education: “The amount of money spent on a student’s education has a real and meaningful impact on the educational opportunity offered that student.” *Id.*

In a separate writing in *Edgewood III* that became the basis of the *Edgewood IV* majority, Justice Cornyn concluded that “[an] ‘efficient education requires more than elimination of gross disparities in funding; it requires the inculcation of an essential level of learning by which each child in Texas is enabled to live a full and productive life in an increasingly complex world.’” *Carrollton-Farmers Branch Indep. Sch. Dist. v. Edgewood Indep. Sch. Dist.*, 826 S.W.2d 489, 525-26 (Tex. 1992) (“*Edgewood III*”) (Cornyn, J.,

concurring and dissenting). Justice Cornyn cited favorably the Kentucky Supreme Court's groundbreaking decision in *Rose v. Council for Better Education*, which defined adequacy in terms similar to those used by the trial court here: "This is precisely the approach taken by the Supreme Court of Kentucky, for example, in requiring that '[e]ach child, every child, in this Commonwealth must be provided with equal opportunity to have an adequate education.'" *Edgewood III*, 826 S.W.2d at 527 (Cornyn, J., concurring and dissenting) (quoting *Rose*, 790 S.W.2d 186, 211 (Ky. 1989)).

In *Edgewood IV*, this Court expressly held that Article VII, section 1 contained a qualitative component and concluded that the "general diffusion of knowledge" and "suitability" clauses should be defined in terms of access to a quality education for all children. 917 S.W.2d at 736; *see also West Orange-Cove I*, 107 S.W.3d at 580. In *Edgewood IV*, the Court also determined that the Legislature had defined the contours of its education duty by articulating seven public education goals, which contemplated providing adequate educational opportunities to all students, and emphasized "that all students will have access to a high quality education." 917 S.W.2d at 728-29.

Finally, in *West Orange-Cove I*, this Court reaffirmed that Article VII, section 1 obligates the Legislature to provide an "adequate" education, meaning that the public school system "must accomplish that 'general diffusion of knowledge . . . essential to the preservation of the liberties and rights of the people.'" 107 S.W.3d at 563. In elaborating on this constitutional duty, the Court recognized that in Education Code § 4.001(a) the Legislature itself has expressly defined the mission of the public school system to accomplish

a general diffusion of knowledge. *Id.* at 581, 584 & n.124 (citing TEX. EDUC. CODE § 4.001(a)).

This Court also reaffirmed in *West Orange-Cove I* that “the State’s provision for a general diffusion of knowledge must reflect changing times, needs, and public expectations.” *Id.* at 572; *see also* FOF 26; 25 RR 56-57 (state expert explaining why curriculum must reflect changing times, needs, and public expectations). The trial court’s definition of adequacy recognizes the reality that Texas is facing rapidly changing times and needs. Commensurate with those changes, public expectations have risen considerably, as reflected in the adoption of TEKS and TAKS. And because of those changes, the trial court properly concluded that the school finance system is out of capacity to meet the Legislature’s own standards, and that therefore the Legislature has failed to meet its constitutional duty to make suitable provision for the general diffusion of knowledge. *See* COL 18-20.

III. THE CURRENT SCHOOL FINANCE SYSTEM FAILS TO PROVIDE ADEQUATE FUNDING FOR A GENERAL DIFFUSION OF KNOWLEDGE; THEREFORE THE TRIAL COURT PROPERLY CONCLUDED THAT THE SYSTEM VIOLATES ARTICLE VII, SECTION 1.

A. The Trial Court Properly Measured the Evidence At Trial Against This Court’s “Substantial Default” Standard.

The question before the trial court was not whether certain courses or competencies are required for an adequate education or whether the TAKS test is an accurate measure of student knowledge. Rather, the question before the trial court was whether school districts have the resources to provide all their students with the opportunity to meet the standards and

goals that the state itself has set, and which the Districts and the TASB Legal Assistance Fund agree would achieve the general diffusion of knowledge.

To answer that question, the trial court had to determine whether the Districts met their burden to show that the Legislature has in fact “substantially defaulted” on its constitutional responsibility. *West Orange-Cove I*, 107 S.W.3d at 580 (citing *Edgewood IV*, 917 S.W.2d at 736). This determination was well within the trial court’s authority as delineated by this Court in *West Orange-Cove I*: “[O]nce policy choices have been made by the Legislature, it is the judiciary’s responsibility in a proper case to determine whether those choices as a whole meet the standard set by the people in Article VII, section 1.” 107 S.W.3d at 582.

As one commentator has observed, the development of the standards-based reform movement has assuaged concerns that courts will overstep their bounds when judging the adequacy of education systems:

Armed with specific, clear, and meaningful standards that are the product of such an extensive political process, courts are better positioned to overcome their self-imposed obstacles to policy reform. No judge has to make additional findings of fact as to the competencies that all children are expected to achieve or whether those competencies are necessary for success in the twenty first century. No judge has to develop a remedial scheme that tells administrators and teachers what all children should know and be able to do. Thus, concerns about judicial fact-finding, expertise, and legitimacy are ameliorated. The court’s main task—at least at the liability phase of the litigation—is to determine whether a school or school system has failed to provide the opportunity for children to meet the requisite standards and whether that failure runs afoul of some legal obligation. This is something that courts are eminently capable of doing.

William S. Koski, *Educational Opportunity and Accountability in an Era of Standards-Based School Reform*, 12 STAN. L. & POL'Y REV. 301, 307 (2001). That observation mirrors precisely what the trial court did and did not do in this case: The trial court did not decide for itself what Texas children should be expected to know and achieve, or tell teachers and administrators what to do. Instead the court used the Legislature's own specific, clear, and meaningful standards to determine if the public school system satisfies the Legislature's constitutional obligation as set out in Article VII, section 1.

An adequate system must have adequate funding. Standards are meaningless without sufficient resources to give each child a meaningful opportunity to meet those standards. As the trial court's findings of fact and conclusions of law reflect, the evidence produced at trial directly demonstrates that the school finance system is out of capacity and that districts do not have the resources needed to provide an adequate education. *See, e.g.*, COL 18-20. The trial court thus correctly concluded in this case that the Legislature has substantially defaulted on its responsibility such that school children are denied access to that education needed to participate fully in the social, economic, and educational opportunities available in Texas. *See West Orange-Cove I*, 107 S.W.3d at 580; *Edgewood IV*, 917 S.W.2d at 736; FOF 18-20.

B. Even Looking Only to "Outputs," the State's Position That It Has Fulfilled Its Constitutional Duty Is Untenable.

The State posits that the trial court "lacked any objective, performance-based standard for evaluating Texas's educational system," and improperly relied on evidence concerning "a variety of educational 'inputs'," such as the compensation and qualification of teachers,

and the condition of school facilities. State Br. at 50. The State dismisses all the evidence from both sides that adequate funding for inputs is integrally related to adequate outputs by complaining that the trial court has “[converted] the unremarkable economic fact of sometimes scarce resources into a constitutional violation.” *Id.* By denying the undisputed effect that inputs have on outputs, the State’s assessment is completely out of touch with the reality of educating today’s school children.

Even looking only at outputs, the inadequacy of Texas’s school finance system is evident from just a few examples of the statewide output evidence—specifically TAKS scores and drop-out/graduation rates. Statewide TAKS scores show vast gaps in performance between white students and minority students, and that economically disadvantaged students and students with limited English proficiency (“LEP”) lag far behind as well. FOF 75. For example, in 2003-04, only 38% of tenth graders could pass all TAKS tests at the panel-recommended cut scores, including only 20% of African-American students, 24% of Hispanic students, 22% of economically disadvantaged students, and 5% of LEP students. *Id.* The trial court also specifically referred to TAKS scores of each of the West Orange-Cove Focus Districts. FOF 136, 155, 184, 200, 209, 227, 241, 252, 260. For example, in Dallas ISD, the trial court noted that only 33% of fifth graders, 39% of eighth graders, and 24% of tenth graders met the panel-recommended standard for all TAKS tests in 2004, and that Dallas ISD students significantly underperformed in the percentage of students taking the SAT/ACT. FOF 136. The trial court made similar findings with respect to the Edgewood Intervenor districts. *See, e.g.*, FOF 465, 556.

The trial court further found that over the last decade, the high-school graduation rate in Texas has consistently been less than 75% for all students, and less than 70% for minority students. FOF 650. In the 2000-01 school year, there was a 40% attrition rate for all Texas students between grades nine and twelve, including an attrition rate of 52% for Hispanics and 46% for African-Americans. AX 9019:12-13; 15 RR 37-38. In 2000-01, the four largest districts, Houston ISD, Dallas ISD, Fort Worth ISD, and Austin ISD each had graduation rates of less than 70%. AX 9019:26; 15 RR 42-48.

Despite this evidence, the State cites performance gains under the TAAS test from 1994-2002 as proof that the low TAKS scores noted above will inevitably improve as a result of the incentives built into the accountability system, even without additional resources. But the trial court rejected this argument, noting a close correlation between the academic gains made during the 1990s and the increase in per-pupil, inflation-adjusted expenditures during the same period. FOF 42; PX 705:24; 7 RR 196-97; PX 758:140-41. Unlike the period of the TAAS regime, school districts no longer have access to additional funding capacity to accomplish performance gains. And even the State's experts agreed that increased resources result in increased student outcomes. See PX 829:1; PX 753:39-40; PX 754:92-95; PX 758:105-06; PX 505:3-12; 23 RR 143-44.

Thus, even the few examples from the lengthy trial record cited above belie the State's claim that outputs alone are the measure of an adequate education system. As the Court stated in recognition of that reality in *Edgewood I*, "The amount of money spent on a student's education has a real and meaningful impact on the educational opportunity afforded

that student.” 777 S.W.2d at 393. Outputs alone cannot measure the adequacy of the public school system.

C. The TASB Legal Assistance Fund Agrees With the Districts That the System Is Not Adequate to Achieve a General Diffusion of Knowledge Under the Legislature’s Own Standards, as Measured by Both “Inputs” and “Outputs.”

Based on the evidence before it, the trial court carefully documented the inadequacy of the “inputs” of the Texas education system. At the state level, the trial court focused on the lack of financial capacity in the system (FOF 102-07), the state’s declining share of the burden of funding public schools (FOF 102, 104), the inadequacies of the school finance formulas (FOF 78-88), and the inadequacy of funding for facilities. FOF 299-306, 385-417. The trial court also highlighted the severe shortage of qualified teachers in Texas, the large number of teachers teaching out-of-field, and the high attrition and turnover among Texas teachers. FOF 89-98, 485-98, 621-48.

More specifically, to take just a few examples, at the district level the trial court noted that the rising costs of educating today’s students to meet state and federal standards has forced districts to cut their budgets in ways that undermine any meaningful opportunity for all students to reach those standards. The trial court pointed to significant budget cuts that have resulted in, among other problems: (1) cutting of numerous teacher and instructional specialist positions, leading to increased class sizes, *see, e.g.*, FOF 131, 149, 178, 196, 211, 225, 238, 251, 261; (2) reductions in funds for teacher training and development, *see, e.g.*, FOF 178; (3) increased reliance on alternatively certified teachers, *see, e.g.*, FOF 127; (4) an

acute shortage of qualified teachers, particularly math, science, bilingual, and special education teachers, *see, e.g.*, FOF 127, 159, 259, 485-509, 621; (5) reductions in services for at-risk students, such as summer school and tutoring, *see, e.g.*, FOF 178, 195-96, 211, 225; (6) inadequate facilities, *see, e.g.*, FOF 307-38; (7) the inability of districts to provide quality bilingual programming, *see, e.g.*, 153, 518-34; (8) the inability of districts to provide adequate libraries and staff as required by the state's own standards for school libraries, *see, e.g.*, FOF 580-620; and (9) the inability of districts to provide remedial programming and adopt other instructional strategies, *see, e.g.*, FOF 138, 153, 185, 228.

Students will not have a meaningful opportunity to meet state standards if they do not have qualified teachers in the classrooms or if class sizes are too large. COL 10. Many students will not have a meaningful opportunity to meet state standards if they do not have access to appropriate remediation, including specialists, extended-day programs, summer school, or other special programs. 5 RR 57-58; PX 699: 15, 17-22. Many students, particularly economically disadvantaged and LEP students, will not have a meaningful opportunity to succeed without access to full-day kindergarten and pre-kindergarten programs to help prepare them to enter the education system. *See* PX 725:23-28, 33-45, 52-55, 61-62; 23 RR 22-23; 6 RR 72-73. Many students entering the Texas school system at the secondary level who lack proficiency in English also lack proficiency in their native language, and will not have a meaningful opportunity to learn the required curriculum unless districts can provide them with small classes and intensive instruction. 6 RR 25-28; 15 RR 146-51. As Commissioner of Education Neeley agreed, "all children in the state of Texas

should have access and a meaningful opportunity to resources [sic] to receive a high quality education, including TEKS, successful completion of TAKS, including the exit level exam, participation in the recommended high school program.” 23 RR 170; *see also* 6 RR 66-67; 7 RR 44.

As the trial court found, heightened state and federal standards, changing demographics, and heightened public expectations have all contributed to make the current system inadequate to meet the constitutional mandate of a general diffusion of knowledge. The TASB Legal Assistance Fund joins the Districts in simply asking the State to meet the promise of its own acclaimed standards and give each student in Texas a meaningful opportunity to meet those standards by making suitable provision for a system with funding adequate to meet those standards. This can be accomplished only if school districts can, among other things, afford to hire and retain qualified teachers, keep class sizes reasonable, and offer help to students now failing the TAKS tests in substantial numbers.

CONCLUSION

The school districts of Texas are doing everything they can to achieve a general diffusion of knowledge with the resources available to them. But, as the evidence at trial demonstrated and the trial court found, the funding system is out of capacity—the resources available today are simply not adequate to achieve that general diffusion of knowledge, as defined by the Legislature’s own standards. The trial court properly rejected the State’s implicit assertion that districts are simply wasting money by trying to reduce class sizes, paying teachers more than the minimum, and keeping in place the programs needed to

provide each child a meaningful opportunity to participate in the RHSP and pass the TAKS assessment.

The TASB Legal Assistance Fund agrees that the state has designed an excellent standards-based, accountability-driven education system designed “to ensure that all Texas children have access to a quality education.” TEX. EDUC. CODE § 4.001(a). There is no doubt that the system sets admirably high goals for school districts, students, and teachers. But what the State wholly ignores is that the people of Texas in the Texas Constitution hold only one party accountable for achieving a general diffusion of knowledge—the Legislature. By failing to adequately fund the system, the Legislature has substantially defaulted on its constitutional duty to provide an adequate education. The TASB Legal Assistance Fund joins the Districts in asking this Court to hold the Legislature accountable for failing to fulfill that duty.

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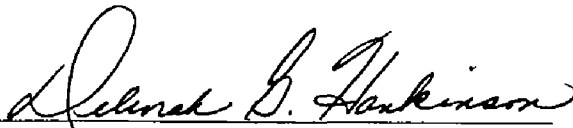
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